



Policy Brief

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Surprise Billing Legislation: What's New? What's Next?

Despite pressure from consumers and the White House, measures related to surprise billing were *not* included in the year-end [funding package](#), making it unlikely that Congress will tackle the issue before 2020. Lawmakers seek to develop a compromise that eliminates surprise billing while still meeting the financial needs of health care stakeholders—a tall order, given that providers and insurers are often on opposing ends of negotiations. Recently, the Senate Health, Education, Labor and Pensions (HELP) and House Energy and Commerce Committees released [draft legislation](#) to protect patients from surprise bills. As the House Ways and Means Committee is also working on a proposal, the bill failed to progress.

Insurers Love It, Hospitals Are Concerned

The House-Senate [compromise bill](#) outlines surprise billing protections for patients needing air ambulance rides, omits a federal “all-payer claims database” and includes additional provisions aimed at improving public health. In the compromise bill, benchmark prices for out-of-network services are set based on in-network rates for a given geographic area—an idea that insurers endorse but hospitals worry will allow insurers to set artificially-low rates for providers. The bill also limits third-party arbitration to those bills over \$750, anything below that mark would be paid at benchmark rates. Hospitals are concerned that this will result in underpayment and jeopardize access to care, especially for rural patients.

Surprise Billing in 2020

Surprise billing measures are not included in the newly-unveiled FY 2020 [spending packages](#), decreasing the likelihood that any compromise will be passed before the year closes. On Monday, HELP Committee Chairman Lamar Alexander (R-TN), [promised](#) to keep surprise medical billing at the top of Congress’ to-do list in the new year.



Insurers Seek Remedy for Risk Corridor Payments Before SCOTUS

In *Maine Community Health Options v. U.S.*, trust in the government's promises to pay billions of dollars in "[risk corridor](#)" payments to insurers are on the line. Insurers argue that this failsafe money, which the Department of Health and Human Services (HHS) never fully paid, was an inducement to participate in the Affordable Care Act's (ACA) Health Insurance Exchanges. A ruling for insurers is more likely to encourage continued private participation in federally sponsored programs, like the Exchanges.

The ACA's passage made a big ask of private insurers: take on extraordinary risk to help expand nationwide health coverage for previously uninsured individuals. In this bargain, the government promised to compensate insurers with appropriated funds if insurers realized losses on the Exchanges. After 2014, however, insurer losses exceeded appropriations due to limitations imposed by Congress. Losses ballooned into the billions and HHS never fully compensated insurers.

After oral arguments on December 10th, many [legal analysts](#) believe the insurers will win the case. If this happens, the federal government would likely be on the hook for \$12 billion. Attorneys disputed where this money would come from, but it would likely be paid from the Federal Government's [Judgment Fund](#). However, legal scholars do not think this will result in [lower premiums](#). Congress could also be urged to amend the ACA to clarify that the government will only pay out losses up to the amount appropriated. Alternatively, Congress could [block the use](#) of the Judgment Fund for future settlements by HHS by passing a statute that overrides the ambiguity caused by the disputed appropriations riders.



Status of the Trump Administration’s Health Care Legal Challenges

Many of the top health care policies championed by the Trump Administration have been facing mounting legal challenges. This includes cases related to price transparency, the 340B program, site-neutral payments, Public Charge determinations and work requirements. Click on the chart below to see which health care policies are wrapped up in (or face potential) litigation and the status of these cases.

Policy	Policy Summary	Case Summary
Hospital Price Transparency Final Rule 	Hospitals are required to post their chargemaster and payer-specific negotiated rates for 300 services.	While this policy is slated to take effect in 2021, the AHA has already filed a lawsuit to reverse it. It's uncertain how the courts will rule on this case. Courts have previously denied cases in which the policy has not yet taken effect, such as in the case of 340B payment cuts. Current Status: The AHA lawsuit is in progress.
Site Neutral Payment Policy 	In an attempt to make payments the same between Hospital Outpatient Departments (HOPDs) and physician offices, CMS mandated reducing payments for HOPD clinic visits by 40%.	Filed by the courts to be an enforcement of CMS' authority , CMS will have to pay back the 2019: CMS is continuing to move forward , but may likely have to make another repayment in the future. Current Status: CMS plans to repay the 2019 cuts but move forward with the 2020 cuts.
Public Charge Final Rule 	HHS will count the legal use of public benefits against permanent residents when applying for citizenship. This policy would include SNAP, housing assistance and Medicaid as a public benefit.	Several lawsuits across the country were filed in October. Federal judges in California, New York and Washington ordered temporary injunctions to stop the rule from taking effect. The litigation is based on the argument that non-cash benefits should not be counted in public charge determinations. Current Status: The Department of Homeland Security successfully appealed two injunctions and will likely win the third.

President Trump Impeached

President Donald Trump will be the third American President to face impeachment. On Wednesday night, the House of Representatives voted—largely [along party lines](#)—to impeach the President for abuse of power and obstruction of Congress. From here, the process moves to the Senate for an impeachment trial. Although the Senate outcome is viewed as [predictable](#), the House’s impeachment is still the most serious constitutional rebuke a President can face, save total removal from office.

Fifth Circuit Affirms Individual Mandate is Unconstitutional, Remands to Lower Court

In a long-awaited [ruling](#), the U.S. Fifth Circuit Court of Appeals affirmed Texas [Judge Reed O'Connor](#)'s decision that the ACA's requirement for Americans to have health insurance exceeds Congress' taxing power. [This case](#) stems from an action by the Trump Administration to reduce the individual mandate's tax penalty to \$0. Despite the Supreme Court originally affirming the constitutionality of the mandate in *NFIB v. Sebelius* in 2012, the Appellate Court found that the penalty reduction meant that the mandate could no longer be "read as a tax." The case also involved a critical question of severability, which would determine whether the ACA could remain valid in the absence of the mandate. The Fifth Circuit unexpectedly left this question unanswered, instead remanding back to Judge O'Connor for another analysis of which portions of the ACA, if any, could survive its ruling.

Congress Passes Government Spending Package

Congress has passed [spending measures](#) to fund the government through September of 2020, a critical step in avoiding another shutdown. Pending the President's approval, nearly \$1.4 trillion in funding will be allocated to various sectors. Highlights from the spending deal include:

- Allocating \$25 million for the CDC to conduct [gun violence research](#)
- Repealing three ACA-related health care taxes, including the "[Cadillac Tax](#)"
- Delaying Medicaid [payment cuts](#) to Disproportionate Share Hospitals for five months
- Raising the legal age to purchase [tobacco products](#) (including e-cigarettes) to 21
- Giving military and civilian federal employees a 3.1% [pay increase](#)
- Negotiating a two-year extension for Medicaid funding to U.S. territories

The spending packages also include \$1.38 billion in border wall funding, more than \$290 million to combat the HIV epidemic and \$425 million to increase [election security](#). Long-term funding was [not included](#) for Teaching Health Center Graduate Medical Education, community health centers or the National Health Service Corps (funding was provided for a 5-month period, however). The President is expected to sign the bill before the shutdown deadline today.



A Look at the Federal Register

Removing Financial Disincentives to Living Organ Donation

The Health Resources and Services Administration published a [proposed rule](#) that seeks to remove financial barriers for living donors who wish to give organs. The rule seeks to establish criteria for reimbursement of lost wages and child/elder care expenses, which do not currently exist.

Revisions to Outcome Measure Requirements for Organ Procurement Organization

CMS [proposed a rule](#) that revises outcome measures for improved transparency, consistency and reliability following feedback from the comments received during the notice and comment period on the CY2020 OPDS rule.

Importation of Prescription Drugs

The Food and Drug Administration (FDA) issued a [proposed rule](#) that allows states and non-federal entities to submit prescription drug importation programs to the FDA for approval. The rule is focused on ensuring the health and safety of Americans is protected, while providing a pathway to reduce the cost of prescription drugs. Additional guidance was released as a companion.

IN OTHER NEWS

[How State Budgets Can Find the Balance Between Social Versus Medical Services](#) – Health Affairs

[Ten Charts on Proposals to Lower Prescription Drug Coverage](#) – KFF

[More Americans are Dying at Home](#) (Op-Ed) – STAT

[Bias in Machine Learning for Clinical Decision-Making](#) – STAT

[A Doctor's Diary: Overnight Shift in the E.R.](#) – NYT

[Kentucky Governor Rescinds Planned Medicaid Work Requirement](#) – AP

[The State of SDoH Progress Today: What's Working, What's Next](#) – Healthcare Business Today